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U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535

August 12, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RE: **In the Matter of)**
Rules and Policies on Foreign)
Participation in the U.S.)
Telecommunications Market)

IB Docket 97-142

Dear Mr. Caton:

Enclosed please find an original and five copies of "REPLY COMMENTS OF THE FEDERAL BUREAU OF INVESTIGATION" in IB Docket No. 97-142, for filing therein. Please date-stamp one of the copies and return it to our courier.

Sincerely,

John F. Lewis, Jr.
Assistant Director in Charge
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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Policies on Foreign Participation in the U.S. Telecommunications Market	)	IB Docket No. 97-142

REPLY COMMENTS OF THE FEDERAL BUREAU OF INVESTIGATION

These Reply Comments are submitted by the Federal Bureau of Investigation (the "FBI"), in further support of the FBI's July 9, 1997 submission in this docket.

Several commenters in these proceedings, including the European Union (the "EU"), Deutsche Telekom ("DT"), and Kokusai Denshin Denwa, have contended that the February 1997 WTO agreement on basic telecommunications services (the "GBT Agreement"), read together with the General Agreement on Trade in Services (the "GATS"), requires the Commission to cease applying its statutory public interest test to all common carrier radio station applications from applicants indirectly controlled by an investor based in a WTO member country. The Commission should reject this position, which reflects a misunderstanding of the GATS, the U.S. offer in the WTO telecommunications negotiations, and U.S. telecommunications law. Should the Commission adopt it, the results would be irrational.

Those advocating this "no public interest test" position argue that under the GATS and the GBT agreement, it would be a violation of most favored nation ("MFN"), national treatment, market access, and domestic regulation principles to continue to apply <u>any</u> public interest criteria in evaluating the application of any prospective licensee whenever an indirect

investor based in a WTO country controls the applicant.[1] Under this view, no matter how great a threat the applicant presented to U.S. national security, law enforcement, foreign policy, trade policy, or other public interest equities (or any combination thereof), the Commission would be required to grant the application unconditionally.

The fundamental point that this position overlooks is that under U.S. telecommunications laws, all common carrier radio station license applicants -- including U.S.-based, American-controlled applicants -- are subject to a full-scale public interest review as a condition precedent to obtaining a license.[2] Thus, and contrary to the views of the EU and certain other commenters, the application of public interest review is non-discriminatory by its nature: all applicants, no matter where they are based or where their

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[1] We do not read the comments of the EU or others as suggesting that aliens or foreign companies should themselves be able to directly obtain and hold FCC common carrier radio licenses -- a result flatly prohibited by U.S. law. 47 U.S.C. §§ 310(a), (b)(1)-(3).

[2] See 47 U.S.C. § 301 ("No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.") (emphasis added); 47 U.S.C. § 307(a) ("The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.") (emphasis added); 47 U.S.C. § 308 (setting forth requirements for licenses); 47 U.S.C. § 303(l)(1) (authorizing the Commission "to prescribe the qualifications of station operators," inter alia); 47 U.S.C. § 310(b)(4) (providing that the Commission shall refuse or revoke any license whenever more than 25% of the capital stock of the parent of the actual or prospective licensee is foreign-owned or controlled, "if the Commission finds that the public interest will be served by the refusal or revocation of such license"); 47 U.S.C. § 214(a) (providing generally that "[n]o carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require" the construction, operation, or extension at issue) (emphasis added).

capital comes from, are subject to such review -- fully in accordance with the MFN and national treatment principles of the GATS, as well as with the principle of GATS Article VI approving domestic regulations affecting trade in services when administered in a "reasonable, objective and impartial manner."

Moreover, the U.S. offer in the GBT negotiations explicitly provided that the "result" of accepting the U.S. "offer of 100% indirect foreign ownership of common carrier radio licenses" would be that "foreign investors will receive national treatment in accordance with U.S. law." Communication From the United States, Conditional Offer, February 12, 1997 (emphasis added) (copy attached at Tab A). As discussed above, a cornerstone of "U.S. law" in this area, "in accordance" with which foreign investors are to be treated under the U.S. offer, is public interest review of license applications. This demonstrates that the U.S. offer (now the U.S. Schedule) by its terms contemplated the preservation of public interest review for foreign indirect investors. Preservation of this review thus is fully consistent with Article XVI of the GATS, "Market Access," which requires the U.S. to accord the service suppliers of other WTO Members treatment "no less favorable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule." (Footnote omitted.)

Similarly, because the U.S. offer in the GBT negotiations, as elaborated upon in the cover note, reserved the authority of the Commission to continue applying public interest review to applicants with capital from WTO countries, DT is mistaken in contending there was a "failure of the United States during the negotiations to inform other countries" that it planned to retain the public interest test. July 9, 1997 Comments of DT, p. 13, n.10.

Consequently, and also contrary to DT (id.), the continued application of public interest review comports fully with Article VI, § 5(a)(ii) of the GATS, which, as applied to the GBT agreement, permits "Domestic Regulation" in the form of licensing and other requirements unless those requirements "nullify or impair" a WTO Member's specific commitments in a manner that "could not reasonably have been expected of that Member at the time the specific commitments" were made.[3]

The "no public interest review" argument would, moreover, lead to an absurd result: U.S.-based applicants for telecommunications licenses would be subject to full public interest review by the Commission, but applicants with substantial investors based in WTO countries would be subject to no public interest review whatsoever. This obviously was not the intent of either the GBT Agreement or the GATS. In addition, because such a result would collide with U.S. telecommunications laws (see footnote 2 above), it is precluded by federal law. See 19 U.S.C. § 3512(a)(1) ("No provision of any of the Uruguay Round Agreements [including the GATS and the GBT Agreement], nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall take

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[3] DT and certain other commenters also err in suggesting it is not possible for the Commission to apply the public interest test in an "objective and transparent" manner or in a manner "not more burdensome than necessary to ensure the quality of service," as contemplated by GATS Article VI. E.g., July 9, 1997 Comments of DT, pp. 12-13. Decades of carefully reasoned Commission precedent demonstrate that the Commission transparently and objectively applies the components of the public interest test to the facts and circumstances of the applications that come before it, in open, published proceedings that feature notice and opportunity for all affected parties to be heard, in a manner that does not unduly burden "quality of service" -- a term that itself must be viewed as encompassing telecommunications services that serve, first and foremost, the interests of the public, which at times may not be coterminous with the interests of a particular license applicant, domestic or foreign.

effect.").

The Commission should reaffirm that the public interest test for common carrier radio station applicants and licensees (whether U.S. or foreign-based) has not been affected by the GATS or the GBT Agreement (apart from those agreements' effect on Effective Competitive Opportunities analysis), and reject the contrary arguments of the EU and certain other commenters. Moreover, and as elaborated upon in the initial comments of the FBI, the Department of Defense, and the Office of the United States Trade Representative, the Commission, in accordance with longstanding practice, should continue to apply the public interest test by deferring to the views of the respective Executive Branch agencies with cognizance over national security, law enforcement, foreign policy, trade policy, and the other equities encompassed by public interest review.

Respectfully submitted,

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